

BEFORE THE  
ENVIRONMENTAL PROTECTION AGENCY  
DEPARTMENT OF TOXIC SUBSTANCES CONTROL  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CARLOS N. BAIRE  
AKA Carlos Baires Jr.  
DBA Baires Trucking  
8904 Thurber Lane  
Bakersfield, CA 93311  
EPA ID No. CAR000108605

File No. HWCA20040455

OAH No. N2005010098

Respondent.

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the DEPT. OF TOXIC SUBSTANCES CONTROL (Department) as its Decision in the above-entitled matter with the following payment schedule.

This Decision shall become effective on July 7, 2005.

IT IS SO ORDERED this 30 day of June 2005 mm dd

~~(Original signed by B.B. Blevins)~~  
B.B. Blevins  
Director

BEFORE THE  
ENVIRONMENTAL PROTECTION AGENCY  
DEPARTMENT OF TOXIC SUBSTANCES CONTROL  
STATE OF CALIFORNIA

In the Matter of the Enforcement Order  
Against:

CARLOS N. BAIRES  
aka CARLOS BAIRES, JR.  
dba BAIRES TRUCKING  
EPA ID No. CAR000108605

Respondent.

Docket No. HWCA20040455

OAH No. N2005010098

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on April 21, 2005, in Sacramento, California.

Sally Magnani Knox, Deputy Attorney General, represented complainant.

Carlos N. Baires appeared on his own behalf.

The case was submitted for decision on April 21, 2005.

**FACTUAL FINDINGS**

1. Complainant Charlene Williams is the Branch Chief, Northern California Branch, Statewide Compliance Division, Department of Toxic Substances Control (Department).
2. Carlos N. Baires, Jr. (respondent) operates a trucking business known as Baires Trucking. As part of his business, he transported hazardous waste at the following location: 8904 Thurber Lane, Bakersfield, California (site). He does not have a state permit, or interim status to manage hazardous waste.
3. On August 12, 2004, complainant issued an Enforcement Order after she determined that respondent had transported 186 separate loads of manifested hazardous

waste without required insurance coverage. Complainant also alleged that respondent had transported hazardous waste without registration. The Order specified: "Effective immediately, Respondent shall not transport hazardous waste without first receiving certification as a hazardous waste transporter from the Department." Respondent's penalty was set at \$65,800.00.

Respondent filed a timely Notice of Defense and request for hearing on August 26, 2004. Complainant issued an Amended Enforcement Order against respondent on April 1, 2005. The Amended Enforcement Order reduced the number of separate loads of manifested hazardous waste alleged to have been transported without required insurance coverage, from 186 to 97. An allegation was also added that respondent failed to notify the Department in writing upon loss of liability coverage. Complainant reduced the amount of respondent's penalty to \$36,600.00.

4. With very few exceptions, a hazardous waste manifest is required for most shipments of hazardous waste. The generator of hazardous waste is typically responsible for preparation of the manifest. Copies are provided to the transporter, to the party receiving the waste and to the Department. In this way, the Department can track hazardous waste from "cradle to grave" and, importantly, be able to identify in an emergency what hazardous wastes are being transported on a given truck. A uniform hazardous waste manifest form is used in California that makes use of Environmental Protection Agency (EPA) ID numbers. There is a unique identifier for each site generating the waste, and also one for each waste transporter. For example, respondent Baires Trucking was assigned EPA ID No. CAR000108605, but it has been on inactive status since June 30, 2004. By using EPA ID numbers as search parameters, the Department can determine the shipment history of hazardous waste materials transported over any given period for a given transporter. Respondent transported thousands of tons of dirt between 2001 and 2004, known to have contained amounts of hazardous waste materials including arsenic, cadmium, chromium, lead, halogenated substances and benz(a)anthracene. Transportation of such materials required the use of a hazardous waste manifest.<sup>1</sup>

5. It was established that between September 6, 2002, and February 7, 2003, respondent transported 60 loads of manifested hazardous waste without required insurance coverage. He transported an additional 37 loads of manifested hazardous waste between May 19, 2003, and September 8, 2003, without required insurance coverage. A hazardous waste transporter is required to notify the Department in writing immediately upon notice of loss of the required liability coverage. Over the periods that he was operating without required insurance, respondent provided no notice to the Department in writing upon loss of his liability coverage.

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<sup>1</sup> An exemption from this requirement allows for transportation of septic tanks and similar waste, and for wastes not exceeding a total of five gallons or that do not exceed a total weight of 50 pounds. (Health & Saf. Code, § 25163.) None of these exemptions applied to respondent.

6. It was established that between December 31, 2002, and February 28, 2003, respondent transported 17 loads of manifested hazardous waste over a period that he was not registered with the Department to do so. Respondent was not lawfully registered as a hazardous waste transporter during the period of time beginning September 7, 2002, until the time when respondent was issued a reinstatement of his registration on February 28, 2003. Respondent's reinstated registration expired on March 31, 2004. Between March 31, 2004, and June 16, 2004, respondent transported 28 loads of manifested hazardous waste over a period that he was not registered with the Department to do so. He transported his last load on June 16, 2004. He is no longer transporting hazardous waste as a part of his business.

7. Respondent acknowledges that he transported manifested hazardous waste without required insurance coverage and that he did so over a period that he was not registered by the Department to do so. He also acknowledges that he provided no notice to the Department in writing upon cancellation of insurance coverage. He does not dispute any of the violations.

8. Respondent is not currently an active registered transporter. His class A driver license has been suspended through the end of May 2005. He explains that most of the time that he was working with hazardous wastes he had no knowledge of the different requirements relating to its transport. He was formerly associated with Dembeste Trucking and this company helped him out initially. He found that it was difficult to obtain standard insurance to transport hazardous waste and that he needed to go through an assigned risk program. He notes that the process for obtaining such insurance took longer and that only two companies provided coverage for transportation of hazardous waste. Respondent avers that it would take up to 48 days to submit and have the necessary paperwork processed. He suggests that this was one of the reasons why there were gaps in coverage when he transported manifested hazardous waste without the necessary insurance coverage.

Respondent knew when he began work as a transporter that he needed to be registered with the Department. The applications were completed for him by Dembeste Trucking and submitted on his behalf. Dembeste Trucking would dispatch him to different sites, even when they knew he did not have current Department registration. Respondent describes most of his work as hauling dirt from construction zones. He did not view this as being particularly dangerous, notwithstanding the presence of hazardous waste in these dirt loads. Respondent understands that it costs more to insure hazardous waste and that he was probably getting paid a premium for transporting hazardous waste loads. However, Dembeste paid according to tonnage and respondent cannot say for sure what the different rates were, or even whether he was paid more for hauling hazardous waste than he was for hauling regular loads.

9. The Department determines an initial penalty for each violation, considering potential harm and the extent of deviation from hazardous management requirements. It determined that the degree of potential harm in this case, based upon the type of waste hauled, was minimal. However, it viewed respondent's failure to have insurance, his failure to provide notice of cancellation of coverage and his transportation of hazardous waste

without registration to do so, as being major deviations from hazardous waste management requirements. The Department uses a penalty matrix that plots the extent of deviation along a vertical axis, and the potential harm along a horizontal axis. (See Cal. Code Regs., tit. 22, § 66272.62.) A nine box matrix is thus created by employing three measures (major, moderate and minimal) for both the extent of deviation and for the potential harm. Within each box or "matrix cell", there is also a penalty range with the midpoint set forth in parentheses. Upward and downward adjustments within these cells are made depending upon the violator's intent. In this way 27 different numbers (in dollars) are generated for use in determining the initial penalty to be assessed for each violation.

Applying the penalty matrix to this case, complainant determined the base penalty for each of the three violations to be \$10,500.00. The initial penalty for respondent's failure to have insurance was increased "by the amount of any economic benefit gained" and this includes avoided costs from not having to pay insurance premiums. (See Cal. Code Regs., tit. 22, § 66272.63.) Complainant figured that respondent avoided paying monthly insurance premiums of \$600.00, over a period of eight and a half months, or a total of \$5,100.00. Accordingly, the total penalty assessment was set at \$36,600.00.

10. Respondent avers that he cannot afford to pay such a high amount. He submitted individual income tax returns for the past two years reflecting adjusted gross incomes of \$22,535.00 and \$11,395.00 for tax years 2003 and 2004, respectively. However, the Department did its own audit of financial documents that respondent submitted and determined that he is able to make payments of \$1,000.00 each month towards any penalty assessment. In determining that the extent of each deviation in this case was major, the Department reasoned that one could either comply or fail to comply with these requirements. While this is correct, it rules out consideration of most of the penalty range for such violations. The matrix cell for a major deviation and minimal potential harm has a range of \$6,000.00 to \$15,000.00. The penalty was set here at the \$10,500.00 midpoint. Downward adjustments are typically made where the violator has demonstrated good faith efforts to comply with regulations or that the violation was completely beyond his control. Respondent does not fall into either of these two situations. In this case, respondent acknowledges all three hazardous waste violations and he is essentially pleading financial hardship. Respondent has not transported hazardous waste materials since June 2004, and he has no intention of ever doing so again. There is reason to believe that some of the violations were driven by the lax and/or careless business practices of Dembeste Trucking, and that respondent's role was more passive, notwithstanding the fact that he was ultimately responsible for obtaining insurance, providing the Department notices of cancellation and obtaining proper registration.

The above matters having been considered, the equities in this case warrant downward adjustment of the penalty to account for respondent's individual circumstances. The base penalty for each of the three violations should be reduced from \$10,500.00 to \$7,500.00. After adding the \$5,100.00 adjustment for economic benefit gained, the total penalty in this case is determined to be \$27,600.00. The Department, in its discretion, may

work out a schedule with respondent for making monthly payments towards this amount as it deems appropriate.

### LEGAL CONCLUSIONS

1. The Department is authorized to order action necessary to correct violations and assess a penalty when it determines that any person has violated specified provisions of the Health and Safety Code or any permit, rule, regulation, standard, or requirement issued or adopted pursuant thereto. (Health & Saf. Code, § 25187.)

2. Respondent violated Health and Safety Code section 25163, subdivision (a) and California Code of Regulations, title 22, sections 66263.11 and 66263.17, by reason of the matters set forth in Finding 5. Respondent transported at least 97 separate loads of manifested hazardous waste without required insurance coverage.

3. Respondent violated Health and Safety Code section 25163, subdivision (a) and California Code of Regulations, title 22, sections 66263.11 and 66263.17, by reason of the matters set forth in Finding 6. Respondent transported hazardous waste without required registration.

4. Respondent violated California Code of Regulations, title 22, sections 66263.15, by reason of the matters set forth in Finding 5. Respondent failed to notify the Department in writing upon loss of liability coverage.

5. The matters set forth in Findings 7 through 10 were considered in making the following Order. Respondent's penalty assessment shall be reduced from \$36,600.00 to \$27,600.00. The Department, in its discretion, may work out a schedule with respondent for making monthly payments towards this amount as it deems appropriate.

### ORDER

The Amended Enforcement Order issued on April 1, 2005, against Carlos N. Baires, doing business as Baires Trucking, is sustained, except that the penalty assessment is reduced to \$27,600.00.

DATED: May 13, 2005

(Original signed by Johnathan Lew)  
JONATHAN LEW  
Administrative Law Judge  
Office of Administrative Hearings